



U.S. Department of Justice
Federal Bureau of Prisons

PROGRAM STATEMENT

OPI: OGC/LIT

NUMBER: 1380.12

DATE: January 3, 2018

Disclosing Potential Impeachment Information Regarding Employees

A handwritten signature in black ink, appearing to read "Mark S. Inch", is positioned below the title.

Approved: Mark S. Inch
Director, Federal Bureau of Prisons

1. PURPOSE AND SCOPE

To implement procedures for disclosure of potential impeachment information to the U.S. Attorneys' Offices and Department of Justice litigating sections that prosecute criminal cases and to:

- Ensure prosecutors receive sufficient information to meet their obligations under *Giglio v. United States*, 405 U.S. 150 (1972).
- Protect the privacy interests of current and former Bureau of Prisons employees.

This Program Statement implements the Attorney General's Policy Regarding the Disclosure to Prosecutors of Potential Impeachment Information Concerning Law Enforcement Agency Witnesses ("*Giglio* Policy"), dated July 11, 2014. In *Giglio*, the Supreme Court held that the failure to disclose material evidence regarding the credibility of a witness is a violation of due process and therefore requires a new trial.

This Program Statement also emphasizes the obligation of individual employees to inform prosecuting attorneys of potential impeachment information prior to providing a sworn statement or testimony in any criminal investigation or case. In most investigations and cases, it is expected that the prosecuting attorney will be able to obtain all potential impeachment information directly from employee affiants or witnesses during the normal course of

investigations or preparation for hearings or trials; however, a prosecutor may also request such information from the Bureau.

a. **Summary of Changes**

Policy Rescinded

P1380.06 Disclosing Potential Impeachment Information Regarding Employees (12/10/98)

- Updated Directives Referenced.
- Expanded the definition of potential impeachment information, encompassing both on-duty and off-duty conduct.
- Changed the title of the Bureau of Prisons contact person for potential impeachment information from the Associate General Counsel for Criminal Litigation to the Associate General Counsel for the Litigation Branch.
- Added guidance that the Bureau contact person should communicate the agency's view on how to handle the potential impeachment information, and the prosecuting office should advise the Bureau contact person how the information is ultimately handled.
- Expanded the circumstances in which the requesting official can keep information relating to the handling of potential impeachment information, and required the requesting official to update the records before relying on them in subsequent cases.
- Added requirement that the requesting official must remove from the prosecuting office's system of records any record that can be accessed by the identity of the Bureau employee at the conclusion of any direct and collateral appeals, or within one year of the employee's retirement, transfer, or reassignment, whichever is later.
- Added requirement that when a Bureau employee with potential impeachment information is transferred to a new district, the Bureau contact person is required to notify the new district's requesting official of potential impeachment information relating to the transferred employee.

b. **Program Objectives.** The expected results of this program are:

- Prosecuting attorneys will be informed by employees of potential impeachment information prior to providing a sworn statement or testimony in any criminal investigation or case.
- When a prosecutor or Department of Justice litigator formally requests potential impeachment information on an employee, that information will be disclosed by the Bureau consistently and lawfully.

c. **Institution Supplement.** None required. Should local facilities make any changes outside the required changes in the national policy or establish any additional local procedures to

implement the national policy, the local Union may invoke to negotiate procedures or appropriate arrangements.

2. IMPEACHMENT INFORMATION

Potential impeachment information relating to agency employees may include, but is not limited to, the following categories:

- Any finding of misconduct that reflects upon the truthfulness or possible bias of the employee.
- Any past or pending criminal charge brought against the employee.
- Any allegation of misconduct bearing upon truthfulness, bias, or integrity that is the subject of a pending investigation.
- Prior findings by a judge that an agency employee has testified untruthfully, made a knowing false statement in writing, or engaged in other misconduct.
- Any misconduct finding or pending misconduct allegation that either casts a substantial doubt upon the accuracy of any evidence – including witness testimony – that the prosecutor intends to rely on to prove an element of any crime charged, or that might have a significant bearing on the admissibility of prosecution evidence.
- Information that may be used to suggest that the agency employee is biased for or against a defendant.
- Information that indicates the agency employee's ability to perceive and recall the truth is impaired.

3. EMPLOYEE OBLIGATION TO DISCLOSE POTENTIAL IMPEACHMENT INFORMATION

As early as possible prior to providing a sworn statement or testimony in any criminal investigation or case, each Bureau employee must inform the prosecutors of:

- Any potential impeachment information (described above), including both on-duty and off-duty conduct.
- Any prior experiences as a witness or affiant (person who swears to an affidavit) in a criminal case.

A prosecutor may decide to also request potential impeachment information from the Bureau.

4. REQUEST FOR INFORMATION FROM THE BUREAU

An official in a prosecutor's office may request potential impeachment information from the Bureau by contacting:

- The Associate General Counsel for the Litigation Branch, Central Office, for prosecutions filed in the District of Columbia. The Associate General Counsel for the Litigation Branch may then delegate the responsibility of serving as the contact person to another attorney in the Branch.
- The respective Regional Counsel, for prosecutions in other districts. The Regional Counsel may then delegate the responsibility of serving as the contact person to another attorney within the Region.

The Bureau's contact person will:

- Serve as the main point of contact concerning potential impeachment information regarding an employee.
- Comply with case law and practice governing the definition and disclosure of impeachment information.
- Consult as needed with the prosecutor's office to verify changes in case law or practice.

5. BUREAU REVIEW AND DISCLOSURE

Once a request for potential impeachment information regarding an employee is received in accordance with this policy, the Bureau contact person authorizes the review of all files regarding the identified employee, including, but not limited to:

- The employee's Official Personnel File.
- Any Office of Internal Affairs (OIA) file regarding the employee.
- Any Special Investigative Supervisor file regarding the employee.
- Any National Crime Information Center (NCIC) background check.
- The employee's local disciplinary file maintained by the Human Resource Department.

The Bureau contact person uses the format in Attachment A to request information from OIA, which forwards any potential impeachment information to the contact person. The contact person may delegate to institution legal staff the responsibility of reviewing all files maintained at the institution and conducting an NCIC background check.

When institution legal staff begin to prepare an employee to testify as a witness or affiant, they ask the employee whether he/she is aware of any potential impeachment information.

Within 15 calendar days of the request (or earlier to meet a court-imposed deadline), the contact person, using the format in Attachment B or C, must advise the requesting official of:

- Any finding of misconduct that reflects upon the truthfulness or possible bias of the employee.
- Any past or pending criminal charge brought against the employee.
- Any allegation of misconduct bearing upon truthfulness, bias, or integrity that is the subject of a pending investigation.
- Prior findings by a judge that an agency employee has testified untruthfully, made a knowing false statement in writing, or engaged in other misconduct.
- Any misconduct finding or pending misconduct allegation that either casts a substantial doubt upon the accuracy of any evidence or that might have a significant bearing on the admissibility of prosecution evidence.
- Information that may be used to suggest that the agency employee is biased for or against a defendant.
- Information that indicates the agency employee's ability to perceive and recall the truth is impaired.

When a decision is made to disclose any potential impeachment information, the contact person must ensure the employee is advised of the disclosure.

The contact person should communicate the Bureau's view on how to handle the potential impeachment information. The requesting official will advise the contact person whether the employee was ultimately used as an affiant or witness in the criminal proceeding and whether any affidavit or testimony was disclosed to a Court or the defense.

6. ALLEGATIONS THAT ARE UNSUBSTANTIATED OR NOT CREDIBLE, OR HAVE RESULTED IN EXONERATION

Generally, allegations that cannot be substantiated or are not credible, or have resulted in the exoneration of an employee, are not considered potential impeachment information.

Nonetheless, upon request, the Bureau contact person must provide to the requesting official such information that reflects upon the truthfulness or bias of the employee in the following circumstances:

- The requesting official advises the contact person that it is required by a Court decision in the district where the investigation or case is being pursued.
 - On or after the effective date of the Attorney General's policy, July 11, 2014:
 - The allegation was made by a Federal prosecutor, judge, or magistrate judge.
 - The allegation received publicity.
- The requesting official and the contact person agree that such disclosure is appropriate, based upon exceptional circumstances of the case or the role of the witness.
- Disclosure is otherwise deemed appropriate by the contact person.

When there is a question of whether information may be used for impeachment purposes, the contact person must provide the information and advise the requesting official, to the extent determined, whether any aforementioned allegation is unsubstantiated or not credible, or resulted in exoneration.

7. RECORDS

To ensure that special care is taken to protect the privacy interests and confidentiality of employees, the Bureau contact person must ask the requesting official to expeditiously return all information and documentation that was not disclosed to the defense counsel. Prosecuting offices are permitted, however, to keep the potential impeachment information, any written analysis or substantive communications about the disclosure or decision, motions, court orders, and supporting documents in the criminal case file.

The contact person must maintain judicial rulings and related pleadings on information that was disclosed to the Court or the defense in a manner that allows expeditious access by any requesting official. The contact person must provide an update on the potential impeachment information when asked by the requesting official.

8. CONTINUING DUTY TO DISCLOSE

Once a request for potential impeachment information has been made, the Bureau contact person must advise the requesting official of any additional potential impeachment information that arises after the request and while the specific criminal case or investigation is pending.

Therefore, Bureau components that have been requested to verify whether there is impeachment information regarding an employee must promptly notify the contact person of any additional potential impeachment information that arises after the initial request.

Six months after a request for potential impeachment information is received, the contact person must inquire of the requesting official whether the specific criminal case or investigation has concluded in a judgment or declination. If the criminal case or investigation has concluded in a judgment or declination, the contact person's duty to disclose ceases.

9. NOTIFICATION OF TRANSFER, REASSIGNMENT, OR RETIREMENT OF EMPLOYEE

The Bureau contact person must notify the requesting official when an employee has retired, been transferred to an office in another judicial district, or been reassigned to a position in which the employee will be neither an affiant nor a witness. Thus, subsequent to the resolution of any litigation pending in the prosecuting office in which the employee could be an affiant or witness, this notice will assist the requesting official in removing from the prosecuting office's system of records any record that can be accessed by the identity of the employee. Specifically, the requesting official must remove the records at the conclusion of the direct and collateral appeals, if any, or within one year of the agency employee's retirement, transfer, or reassignment, whichever is later.

When an agency employee is transferred to a new district, the contact person must also ensure that the requesting official in the new district is advised of any potential impeachment material known to the Bureau. The requesting official in the new prosecuting office must seek an update from the contact person on any information received from the originating office as part of the *Giglio* analysis.

REFERENCES

Program Statements

- P3293.01 Personnel Records and Files (7/25/17)
- P3420.11 Standards of Employee Conduct (12/06/13)

ACA Standards

None.

Records Retention Requirements

Requirements and retention guidance for records and information applicable to this program are available in the Records and Information Disposition Schedule (RIDS) on Sallyport.

Attachment A. OIA Memorandum

[Date]

MEMORANDUM FOR THE CHIEF, OFFICE OF INTERNAL AFFAIRS

[Name of BOP Contact Person], Regional Counsel/ Associate General Counsel, Litigation Branch

SUBJECT: *Giglio* Request

My office has received a *Giglio* request from [name, title, and office of Requesting Official]. In order to comply with this request, please provide me with any information your office may have regarding the following Federal Bureau of Prisons employee(s).

[list full name of employee(s) and current duty station]

If your office has no information regarding the above-referenced employee(s), please notify accordingly. Your immediate attention to this matter is appreciated. If you have any questions, please contact me at [telephone number].

Attachment B. *Giglio* Request Response

[Date]

[Requesting Official's name and address]

Re: [Case name] [Case number]

Giglio Request Response

Dear Mr./Ms.:

This letter is in response to your *Giglio* request for potential impeachment information regarding the Federal Bureau of Prisons employee(s) who may be requested to be a witness or affiant in the above-referenced matter. Pursuant to your request, the Office of Regional Counsel [or Associate General Counsel, Litigation Branch] has coordinated a review of agency files for evidence of misconduct, perjurious conduct, acts of dishonesty, bias, or otherwise potentially impeachable information.

A review of agency files for the Federal Bureau of Prisons employee(s) listed below revealed no pertinent information:

[List full name of employee and current duty station]

Please arrange to serve a trial notice or subpoena on staff who are listed as a potential witness or affiant in your letter. For the travel authorization to be processed and staffing coverage to be arranged, it is imperative that staff receive written notification of the trial date. Please contact [institution legal staff] at [telephone number] to confirm the trial date and witness/affiant arrangements. Please copy this office with your final witness list prior to the trial date so that we can arrange travel authorizations.

If you have any questions regarding this information, or if we can be of any further assistance, please do not hesitate to call my office at [telephone number].

Sincerely,

[Name of BOP Contact Person]

Regional Counsel [or Associate General Counsel, Litigation Branch]

Attachment C. *Giglio* Request Response

[Date]

[Requesting Official's name and address]

Re: [Case name] [Case number]

Giglio Request Response

Dear Mr./Ms.:

This letter is in response to your *Giglio* request for potential impeachment information regarding the Federal Bureau of Prisons employee(s) who may be requested to be a witness or affiant in the above-referenced matter. Pursuant to your request, the Office of Regional Counsel [or Associate General Counsel, Litigation Branch] has coordinated a review of agency files for evidence of misconduct, perjurious conduct, acts of dishonesty, bias, or otherwise potentially impeachable information.

A review of agency files for the Federal Bureau of Prisons employee(s) listed below revealed the following allegation:

[List full name of employee and current duty station] Description of information:

Recommendation for disclosure based upon whether the allegation is unsubstantiated, not credible, or resulted in the employee's exoneration:

Please arrange to serve a trial notice or subpoena on staff who are listed as a potential witness or affiant in your letter. For the travel authorization to be processed and staffing coverage to be arranged, it is imperative that staff receive written notification of the trial date. Please contact [institution legal staff] at [telephone number] to confirm the trial date and witness/affiant arrangements. Please copy this office with your final witness list prior to the trial date so that we can arrange travel authorizations. Finally, to protect the privacy interests of employees, I request that you expeditiously return all information that was not disclosed to the defense counsel.

If you have any questions regarding this information or if we can be of any further assistance, please do not hesitate to call my office at [telephone number].

Sincerely,

[Name of BOP Contact Person]

Regional Counsel [or Associate General Counsel, Litigation Branch]